

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Statutes involved.....	2
Question presented.....	3
Statement.....	3
The question is substantial.....	7
Conclusion.....	15
Appendix A.....	16
Appendix B.....	22

CITATIONS

Cases:

<i>Associated Press v. United States</i> , 326 U.S. 1.....	8
<i>Hughes v. United States</i> , 342 U.S. 353.....	2
<i>International Salt Co. v. United States</i> , 332 U.S. 392.....	8
<i>National Labor Relations Board v. Express Pub. Co.</i> , 312 U.S. 426.....	9
<i>Swift & Co. v. United States</i> , 276 U.S. 311.....	13
<i>Timken Roller Bearing Co. v. United States</i> , 341 U.S. 593.....	2
<i>United States v. Crescent Amusement Co.</i> , 323 U.S. 173.....	8
<i>United States v. Hartford-Empire Co.</i> , 1 F.R.D. 424.....	10, 11
<i>United States v. Loew's, Inc.</i> , 371 U.S. 38.....	10
<i>United States v. Parke, Davis & Co.</i> , 365 U.S. 125.....	2
<i>United States v. United States Gypsum Co.</i> , 340 U.S. 76.....	8, 9

Statutes:

Clayton Act, 38 Stat. 730, as amended, 15

U.S.C. 12, *et seq.*

Section 5, 15 U.S.C. 16 ----- 2, 12

False Claims Act, 31 U.S.C. 231 ----- 3

Sherman Act, 26 Stat. 209, as amended,

15 U.S.C. 1, *et seq.*

Section 1 ----- 2, 3, 4

Section 4 ----- 1, 2

Congressional material:

51 Cong. Rec.:

13851 ----- 12

15638 ----- 12

15825 ----- 12

16276 ----- 12

S. Doc. 584, 63rd Cong., 2d Sess. ----- 12

Subcommittee No. 5, House Committee on

the Judiciary, 86th Cong., 1st Sess., *The*

Consent Decree Program of the Department of

Justice ----- 13

In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

UNITED STATES OF AMERICA, APPELLANT

v.

WARD BAKING CO., ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA**

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (Appendix A, *infra*, pp. 16-21) is not yet reported.

JURISDICTION

The count of the complaint involved in this appeal was filed under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4, to prevent and restrain violations of Section 1 of that Act. The judgment of the district court (Appendix B, *infra*, pp. 22-26) was entered on December 10, 1962, and the notice of appeal was filed on February 4, 1963. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as

amended, 62 Stat. 969, 15 U.S.C. 29. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593; *Hughes v. United States*, 342 U.S. 353; *United States v. Parke, Davis & Co.*, 365 U.S. 125.

STATUTES INVOLVED

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*, provides in pertinent part:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

The Clayton Act, Section 5(a), 38 Stat. 731, 15 U.S.C. 16, provides as follows:

Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such

3

defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

QUESTION PRESENTED

After consent decree negotiations in a civil anti-trust suit had reached an impasse, the appellees requested the district court to enter an injunction which was narrower than that sought by the government. The question presented is whether the district court erred in entering the judgment proposed by the appellees, without the government's consent and without trial of the issues presented by the complaint.

STATEMENT

On July 21, 1961, the United States filed a complaint in two counts charging five bakery companies (the appellees) with combining and conspiring to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville, Florida area, and to submit non-competitive and rigged bids and price quotations on such business. Count I charged that such conduct violated the False Claims Act (31 U.S.C. 231-233), and sought forfeitures and double damages as provided in that Act. Count II charged that the conduct violated Section 1 of the

Sherman Act, and sought the following relief: (1) an adjudication that defendants had violated that Act; (2) an injunction prohibiting defendants from allocating among themselves the business of supplying bakery products to federal naval installations in the Jacksonville area and submitting rigged bids for such business; (3) "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate . . .".

As a result of settlement negotiations, the parties agreed to dispose of Count I by the appellees' payment of \$44,000.

The parties were unable to agree upon the terms of a consent decree to settle the Sherman Act count. At a pre-trial conference on May 8, 1962, the appellees submitted a "Motion for Entry of a Consent Judgment" together with a proposed judgment to which the government had not consented. The motion stated that the judgment was "framed in the language used by the Plaintiff in its prayer for relief"

"Prior to the filing of the complaint, an indictment had been returned in that court (Case No. 11677-Crim-J) charging the same defendants with violating Section 1 of the Sherman Act by committing substantially the same acts as were charged in Count II of the complaint. Over the government's objection, the district court accepted from all of the defendants pleas of *nolo contendere* to this indictment and to a second indictment (Case No. 11676-Crim-J) charging four of the five defendants with conspiring to fix the price of bread and rolls on sales to "wholesale accounts," defined as "grocery stores, supermarkets, restaurants, hotels, and similar large purchasers . . .".

In opposing acceptance of the *nolo* pleas, government counsel briefly discussed the facts involved in the cases, but did not present in any detail the evidence which would have been introduced at trial.

3

and purported to provide "every safeguard" needed to prevent and restrain the alleged violations (Motion, pp. 3-4). The proposed judgment enjoined each of the appellees from agreeing to submit "noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States Naval installations in the Jacksonville area," or to "[a]llocate, divide or rotate the business of supplying bakery products to United States Naval installations in the Jacksonville area"; and from "disclosing to or exchanging with any seller of bakery products" its intent to submit or not submit a bid, or the terms of any such bid for supplying ~~bakery~~ bakery products to naval installations in the Jacksonville area. The proposed judgment also required each appellee to submit a sworn statement of non-collusion with every bid for bakery products submitted to any naval installations in the Jacksonville area for three years after entry of the judgment.

After an oral hearing, the court ordered the government to show cause why the proposed judgment should not be entered. The government filed objections. The appellees then submitted an amended judgment which made three changes in their original proposal: (1) its scope was broadened to cover all bakery products, not only bread and rolls; (2) the prohibition against allocating business and rigging bids on sales to naval installations in the Jacksonville area was extended to all sales to the United States, its agencies or instrumentalities; (3) the period during which the appellees were required to submit sworn statements of non-collusion was increased from three to five years.

6

The government objected to entry of the amended judgment submitted by defendants. It contended that the defendants' proposed judgment was still inadequate because (1) the prohibition against conspiring to fix prices of bakery products covered only sales to the federal government; and (2) there was no injunction against the appellees "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products." In these circumstances, the government urged that the court could not terminate the case by entry of judgment without either the government's consent or a trial of the merits.

The district court entered appellees' proposed amended judgment, which recited that it was entered "without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony" (App. B, *infra*, p. 22). The court held that "[b]ased upon this court's knowledge of the facts involved in Case No. 11677-Crim-J [see n. 1, *supra*] and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint"; and that the judgment "appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set

¹ The government agreed to a modification of this proposed provision to permit the appellees to print the suggested retail price of their products on the package (Affidavit of H. M. Blackshear, Jr., p. 4, attached to Amended Motion for Entry of Judgment, dated June 6, 1962.)

forth in the complaint * * * (App. A, *infra*, p. 20). The court stated (*ibid.*) that the government's "demand [for] * * * the two controversial provisions * * * does not have a reasonable basis under the circumstances here present" and constituted "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act * * *."

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question in the administration of the antitrust laws as to the authority of a district court to terminate a government civil antitrust suit without a trial by entering a judgment providing narrower relief than that upon which the government is willing to settle the case through a consent judgment.

1. The district court had no basis for denying the government the full relief requested. The court could not possibly determine, without the benefit of the evidence developed at a trial, the exact character of the relief to which the government would be entitled. The pleadings and arguments on motions, even when taken together with the arguments on accepting pleas of *nolo contendere* in a companion criminal case (see n. 1, *supra*), furnish no foundation for concluding that the judgment proposed by the appellees gave the government "all the relief to which [it] would be entitled" after a successful trial on the merits.

In antitrust litigation "[a] full exploration of facts is usually necessary in order properly to draw * * *

a decree" (*Associated Press v. United States*, 326 U.S. 1, 22). Such cases customarily involve the presentation of detailed and extensive evidence covering the basic competitive practices in the industry, the history, development and scope of the violations, the extent and manner of the participation by the various individuals involved, and the probable development of the industry. A district court in antitrust litigation has a "wide range of discretion * * * to mould the decree to the exigencies of the particular case" (*United States v. Crescent Amusement Co.*, 323 U.S. 173, 185; see *International Salt Co. v. United States*, 332 U.S. 392, 400-401). But the very breadth of such discretion necessarily requires the court to have before it all the facts bearing on the scope of appropriate relief before it determines what "action by the conspirators * * * will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States v. United States Gypsum Co.*, 340 U.S. 76, 88).

In the *Gypsum* case this Court explicitly recognized the principle "that relief, to be effective, must go beyond the narrow limits of the proven violation" (340 U.S. at 90). In implementing this principle, the Court ordered the scope of the decree in that case extended "to include all interstate commerce" although the "complaint of Sherman Act violation was restricted to the eastern territory of the United States" (*ibid.*). It also pointed out that in resolving doubts as to appropriate antitrust relief "courts should give weight to the fact of conviction as well as the circumstances under which the illegal acts occur" (*id.*,

p. 89). The basic error of the court below was not in refusing to broaden the relief but in refusing to hear the evidence required for an informed judgment as to how broad the relief should be.

These are not empty generalities. The proper scope of an equity decree intended to prevent future wrongdoing necessarily depends upon the extent of the wrongdoing, its duration and intensity, upon whether it was an isolated infraction or part of a larger scheme, upon whether it was company-policy formulated or approved by the highest executives or independent misconduct of subordinates. In the present case, the government's right to an injunction against allocating business and fixing prices on sales to non-government customers, and against urging or suggesting resale prices, would depend upon detailed evidence of the nature and extent of the combination and conspiracy. If, for example, it appeared that high-level management of the appellees had authorized or participated in the conspiracy to restrain trade in dealing with the government in the Jacksonville area, the additional provisions sought by the government might well turn out to be necessary to assure the public freedom from the continuance of similar illegal conduct in other markets under the supervision of that management. Cf. *United States v. United States Gypsum Co.*, 340 U.S. at 88. "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts" (*National Labor Relations Board v. Express Pub. Co.*, 312 U.S. 426, 436).

Of course, after a trial the district court might have concluded that the facts developed showed no need for relief any broader than that proposed by the appellees. *United States v. Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio). The government, however, could then have appealed that ruling to this Court, which would then "examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation" (*United States v. Loew's Inc.*, 371 U.S. 38, 52 (emphasis added)).

All the facts bearing upon the proper scope of relief in an antitrust case cannot be presented adequately in the pleadings and statements of counsel or at pretrial conferences. Inferences concerning the responsibility and intent of corporate executives, like appraisal of the virulence of a conspiracy, depend upon seeing and hearing the witnesses. The government is not entitled to a trial in order to conduct a fishing expedition, but having clear and concrete evidence of a conspiracy to fix prices upon some sales of bread, it cannot be required to abandon its request for an injunction against future related violations until the full details and extent of the conspiracy have been developed by discovery and trial.

The impossibility of determining what relief was appropriate without knowing all the facts, led the court in *United States v. Hartford-Empire Co.*, *supra*, to reject a similar attempt by the defendants to have the court terminate an antitrust case by entering "consent" judgments to which the government had not consented. There, the court pointed out (p. 429):

* * * The court does not now know and cannot pre-judge what the testimony in this case will disclose; therefore, he cannot anticipate what form of relief he would deem to be wise, expedient, and necessary to be entered into a decree, if it be found that some or all or substantially all of the allegations of the complaint are sustained. Hence the court cannot now say that the proposed decree would satisfy everything requested in the prayer. * * *

* * * Until the record contains facts upon which conclusions may be based, the court feels that he would do wrong and commit error to anticipate facts and approve one or all of the proposed decrees at this time.

The court also noted (p. 427) that even assuming that the injunctive provisions proposed in one of the decrees "would be all that might be deemed necessary after the facts have been submitted, is the court actually now in a position to so determine and pre-judge?

* * * I am of the opinion that an impossible situation would be reached by sustaining and signing such a proposed decree in anticipation of what the facts may be."

The same considerations also negate the district court's conclusion (App. A, *infra*, p. 20) that the government's insistence upon these two provisions "does not have a reasonable basis under the circumstances here present." There may be cases in which it is possible to say that it would be an error of law to grant the relief requested by the government upon any con-

receivable set of facts that could be developed under the complaint. But obviously this is not such a case. Here, clearly, the determination of whether there is a reasonable basis for the relief sought by the government cannot be made until after there has been a full exploration of all the facts as to the alleged violations of law and the inferences to be drawn from them.

2. The district court improperly attempted to substitute its judgment for the discretion vested by law in the Attorney General when it ruled that the government's insistence upon the provisions as a condition of settling the Sherman Act count was "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties" (App. A, *infra*, p. 20). The main purpose of Section 5 was to aid treble-damage *plaintiffs* by making "a final judgment or decree" in a government antitrust suit "that a defendant has violated said laws. * * * prima facie evidence against such defendant" in a subsequent treble-damage action (15 U.S.C. 16; see 51 Cong. Rec. 13851). The proviso excepting "consent judgments or decrees entered before any testimony has been taken. * * *" (S. Doc. 584, 63rd Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825) was inserted to save the government needless litigation expense by encouraging defendants to enter into consent decrees before trial (51 Cong. Rec. 16276). There is nothing in the language, legislative history or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to decide upon

what terms it would be in the public interest to settle an antitrust case rather than proceed to trial.

In *Swift & Co. v. United States*, 276 U.S. 311, this Court, in rejecting the contention that an antitrust consent decree was void "because the Attorney General had no power to agree" to a judgment which prohibited the defendants from doing acts which themselves were not illegal, stated (pp. 331-332): "[W]e do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." The discretion of the Attorney General, as the government's chief law officer, to refuse to settle a particular case, except upon the terms he chooses, is no less than his discretion to agree to particular terms in a consent judgment, which was upheld in *Swift*. It is not for a district court to consider whether the Attorney General has made an "erroneous decision" in insisting upon certain terms of settlement; it cannot substitute its discretion for that of the Attorney General as to the appropriate basis for settlement. Even in such a case, the court has no alternative but to reject the defendant's proposed "consent" judgment and let the case go to trial.

3. The question plainly is important in the administration of the antitrust laws. More than 75 percent of civil antitrust suits brought by the government are now being terminated by consent judgments.* In the

* Subcommittee No. 5, House Committee on the Judiciary, 80th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 7 (Comm. Print. 1959).

negotiation of such judgments, there is inevitably great give and take on both sides, and the decision by each side on how far to compromise depends on a number of factors. From the government's side, it involves the importance of the case, the strengths and weaknesses of the evidence, and the likelihood of success both on the merits and in obtaining all the relief deemed appropriate. There are cases in which the government, during the course of consent decree negotiations, abandons particular items of relief which it would seek if the case went to trial and it prevailed, solely in order to reach a settlement of the case.

If, however, a district court, after there has been some preliminary agreement between the government and the defendants as to the scope of a decree but before the facts as to the alleged violation have been fully established, can terminate the litigation by deciding what relief it deems appropriate without hearing evidence, the inevitable effect would be a weakening of the antitrust enforcement program of the Department of Justice. For government negotiators would be understandably reluctant to offer any concessions, even in preliminary negotiations, if such concessions could be used by the defendants as a basis for seeking entry of a judgment to which, if the negotiations had continued, the government never would have consented. Conversely, antitrust defendants would be well advised never to accede to a consent decree proposed by the government without first seeking more favorable terms from the district court. They would have everything to gain and nothing to

lose by urging the district court to enter their proposed decree without trial unless the government could prove that it was inadequate, while at the same time preserving their right to go to trial if the court should reject their proposal.⁴ Such a one-way street is the antithesis of the basic concept of pretrial settlement upon which the negotiation of consent decrees rests.

CONCLUSION

This appeal presents a substantial question of public importance in the administration of the antitrust laws. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
PATRICK M. RYAN,
Attorneys.

APRIL 1963.

* That is precisely what the appellees did in the present case:

THE COURT: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see? I'm going to enter a Decree here. I'm not just going to enter an Order after this thirty days expires, saying that we'd better go on to trial.

Isn't that understood?

MR. DUNLAP [defense counsel]: No, sir.

MR. STUCKEY [government counsel]: No, sir.

THE COURT: It isn't!

MR. DUNLAP: No, sir, because I think we clearly withheld that at the last hearing. * * * That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree. [Transcript, hearing on June 14, 1962, pp. 89-90.]

APPENDIX A

**United States District Court, Middle District of
Florida, Jacksonville Division**

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, PLAINTIFF

v.

WARD BAKING COMPANY, ET AL., DEFENDANTS

ORDER

This cause came on to be heard on June 14, 1962 on defendants' motion for entry of judgment and upon the plaintiff's opposition thereto. All parties were represented before the court. The situation confronting the court can be best understood by a review of the record and events in this case, and in the companion criminal antitrust action, Criminal Action No. 11677 Crim-J.

On March 6, 1961 an indictment was returned by the Grand Jury in this district, charging that Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company had engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act. The combination and conspiracy complained of consisted of an agreement among the defendants (1) to allocate among themselves the business of supplying bakery products to Federal Naval Installations in the Jacksonville area which encompassed Northeast Florida and Southeastern Georgia, and (2) to submit non-competitive, collusive and rigged bids

and price quotations for supplying bakery products to the Federal Naval Installations in the said Jacksonville area.

On April 10, 1961 the arraignment in the criminal action took place. All of the defendants asked leave to interpose pleas of nolo contendere. After argument before the court, the court granted such leave, accepted the defendants' pleas of nolo contendere, and imposed substantial fines on each defendant.

Thereafter, on July 21, 1961 the United States of America filed a civil complaint against the same defendants based upon the same facts as were presented in the companion criminal antitrust action No. 11677-J. In Count One of the complaint so filed in this cause, the plaintiff charged the defendants with violations of the False Claims Act (31 U.S.C. Sects. 231-233) and requested forfeitures and double the amount of damages suffered by the plaintiff due to defendants' acts.

In Count Two of the civil complaint, the plaintiff alleged violation of Section 1 of the Sherman Act, charging the defendants with allocating among themselves the business of supplying bakery products to the United States Naval Installations in the Jacksonville area and with submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in that area.

The plaintiff then asked that the defendants be enjoined from

(1) Allocating among themselves the business of supplying bakery products (meaning bread and rolls) to the United States Naval Installations in the Jacksonville area, defined as the Northern part of the State of Florida and the Southeastern part of the State of Georgia, and from

(2) Submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in the Jacksonville area.

The plaintiff also asked for such further, general and different relief as the nature of the case may require and the court may deem appropriate in the premises.

During the months of March and April of 1962, the defendants negotiated with the plaintiff in an effort to dispose of this civil action, on the basis of the payment of moneys sought in Count One and a consent decree as to Count Two. The parties were able to agree on a monetary settlement of Count One, but were unable to agree to a form of proposed judgment to settle Count Two.

On May 8, 1962 a hearing was held by the court on all remaining issues in the case. Count One was settled by the payment by the defendants of the sum of \$44,000. At the same time the defendants filed with the court a motion for entry of judgment, attaching to said motion a proposed form of Judgment on Count Two which, if entered, would grant the specific relief against the defendants which had been requested by plaintiff in paragraph (b) of its prayer for relief. The plaintiff's attorney also tendered to the court a proposed form of judgment on Count Two. At the conclusion of this hearing the court issued an order to show cause why defendants' motion for entry of a judgment on Count Two should not be granted and why the proposed judgment tendered therewith should not be entered. The plaintiff did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief

was prayed for or to broaden the scope of the injunctive relief requested.

Prior to the hearing on said order to show cause, the defendants filed an amended motion for entry of judgment, which substantially expanded the scope of the judgment as originally proposed by them, and affidavits were filed by the parties. The amended proposed judgment enlarged the scope of the injunctive relief to cover sales of all types of bakery products and to expand the area of sales from sales to Naval Installations in the Jacksonville area to sales to the United States of America and its agencies or instrumentalities wherever located.

The proposed judgments as ultimately tendered to the court by the plaintiff and defendants were alike except in the following respects:

(1) The judgment proposed by defendants applied to the sale of bakery products to the United States of America, its agencies or instrumentalities. That proposed by the plaintiff applied to the sale of bakery products to third persons and was not limited to sales to the United States of America, its agencies and instrumentalities.

(2) The judgment proposed by the plaintiff enjoined the defendants from urging or requiring any seller of bakery products to adhere to any particular price or other terms or condition of sale for bakery products.

The court notes that the injunctive aspects of the judgment proposed by the defendants are much broader than the relief specifically requested by the plaintiff in its complaint as to the type of products involved, the geographical area covered, and the classes of customers who would be affected. The complaint as filed concerned only sales of bread and rolls

to Naval Installations in the restricted Jacksonville area.

The demand of the plaintiff as to the inclusion of the two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties. See *Twin Ports Oil Co. v. Pure Oil Co., et al.*, (D.C. Minn. 1939), 26 F. Supp. 366; *U.S. v. Brunswick-Balke-Collender Co.*, (D.C. Wisc. 1962), 203 F. Supp. 657.

On this record the form of the proposed judgment tendered by the defendants appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and grants a restraint much broader than the relief prayed for by the plaintiff. Based upon this court's knowledge of the facts involved in Case No. 11677-Crim-J and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint.

It appears to the court that the Department of Justice, by withholding its consent to the proffered judgment, is frustrating the clear intent of Congress to encourage early entries of injunctive decrees without long and protracted trials, and that the government is attempting to place the defendants in the position of either capitulating to an arbitrary and unauthorized demand, or undergoing the ordeal of a long and costly trial.

The mere fact that a court has found a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. *N.L.R.B. v. Express Publishing Co.* 1944, 313 U.S. 246, 435-436, 61 S. Ct. 693, 699, 85 L. Ed. 930.

This court sitting as a court of equity has power to afford the defendants relief. *U.S. v. Brunswick-Balks-Collender Co.* (E.D. Wisc. 1962), 203 F. Supp. 657.

The amended motion of the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company for entry of judgment is hereby granted.

Dated at Tampa, Florida this 10th day of December, 1962.

[S] BRYAN SIMPSON, *Chief Judge.*

APPENDIX B

**United States District Court, Middle District of Florida,
Jacksonville Division**

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, PLAINTIFF

v.

**WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING
COMPANY, INC., AND SOUTHERN BAKERIES COMPANY,
DEFENDANTS.**

FINAL JUDGMENT—COUNT II

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961 and final judgment having been entered on Count I of the complaint and the defendants, by their respective attorneys, having filed a Motion for Entry of a Judgment along with amendments in conformity thereto with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony it is hereby

**ORDERED, ADJUDGED AND DECREED upon
Count II of the complaint as follows:**

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto and Count II of the complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An

Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

II

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

III

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying any bakery products to United States of America, its agencies or instrumentalities, or

(b) Allocate, divide or rotate the business of supplying any bakery products to United States of America, its agencies or instrumentalities.

IV

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

V

Each defendant is ordered and directed for a period of five years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency of the United States of America (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VI

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to the United States of America, its agencies and instrumentalities; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of

the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any governmental agency of the United States of America.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

DATED at Tampa, Florida this 10th day of December, 1962.

BRYAN SIMPSON, *United States District Judge.*

APPENDIX

AFFIDAVIT

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to _____ (name of recipient of bid) dated _____ has not been prepared by _____ (name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____ (name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on _____, 1962.

Dated: _____, 1962